

Respondent requests review of whether the ALJ erred in finding that the prevailing factor for claimant's injuries is due to the accident sustained on October 27, 2011. Respondent argues claimant's ongoing pain condition is due to her preexisting medical problems.

Claimant argues the ALJ's Order should be affirmed.

The sole issue is whether the claimant's October 27, 2011 accident was the prevailing factor causing her back, hip and leg injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant, a licensed practical nurse and certified home plus operator, was injured October 27, 2011, and she described her accident:

Transferring a resident, he was an Alzheimer resident, I believe was having a stroke or had recently had a stroke. Hospice nurse came in, was actually going to look at his foot. So we were going to transfer him from the recliner to the bed. Upon trying to transfer him from the recliner to the wheelchair he was resistive; and as we were lifting him I felt something pop in my back felt pain down my leg and told the caregiver we were going to have to set him back down, couldn't make it to the wheelchair. So we did. And tried again, finally got him to the wheelchair. Hospice nurse helped us push him into the bedroom and we did get him onto the bed.¹

Claimant notified Angie Lee and Jeanette Steele regarding her back injury. Respondent referred claimant to Dr. Mark Dobyns the next day because claimant was having severe pain when she got up to take a shower. On October 28, 2011, Dr. Dobyns performed an examination, evaluated and placed restrictions on claimant. After her appointment she returned to work for a couple of hours. She worked her next scheduled work day on Monday, October 31, 2012. Around 4:30 p.m. claimant was called into the office and respondent terminated claimant.

On December 19, 2011, Dr. George Flutter examined claimant at the request of claimant's attorney. Dr. Flutter reviewed claimant's prior medical records and performed an examination of claimant. Dr. Flutter noted the treatment claimant was receiving from Dr. Pedro Murati before the October 27, 2011 work-related accident. Dr. Flutter diagnosed claimant with low back/left leg pain; lumbosacral strain/sprain; probable left lower extremity radiculitis; myofascial pain affecting the lower back and buttocks; probable sacroiliac joint dysfunction; probable trochanteric bursitis and probable left ischial bursitis. Dr. Flutter

¹ P.H. Trans. (Jan. 24, 2012) at 7-8.

further found a causal connection between claimant's current condition and the accident on October 27, 2011. And Dr. Flutter opined the accidental injury was the prevailing factor for claimant's condition.

The parties then agreed to designate Dr. Paul Stein the treating physician. Dr. Stein received a letter from respondent's attorney that indicated the doctor was to provide treatment if the prevailing factor was the incident at work on October 27, 2011. Dr. Stein's initial impression was that claimant appeared to have sustained injury to her lower back with lower extremity radiculopathy due to the injury at work. But Dr. Stein then referred claimant for diagnostic tests in order to determine the prevailing factor for claimant's complaints. After receipt of the tests, Dr. Stein issued a report dated March 26, 2012, which reviewed the x-rays and MRI scan of claimant's lumbar spine. The doctor concluded the testing showed mild scoliosis of the lumbar spine and multilevel degenerative disk disease with bulging. No disk herniation or stenosis was revealed. Consequently, Dr. Stein concluded there was nothing to account for claimant's left lower extremity complaints or any structural injury to her spine and the prevailing factor for her lower back complaints was claimant's preexisting degenerative disk disease which was symptomatic before the accident.

Dr. Flutter then reviewed the medical records and reports generated by Dr. Stein. Dr. Flutter noted that he had not diagnosed degenerative disk disease and the tests did not change his opinion that the prevailing factor for claimant's condition was the work-related accident on October 27, 2011.

Claimant testified that before the accident on October 27, 2011, she had been able to perform her job duties without significant back pain.

K.S.A. 2011 Supp. 44-508(d) defines accident:

'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(g) provides:

'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

In this case Dr. Stein opined the prevailing factor for claimant's back condition was her preexisting degenerative disk disease. Conversely, Dr. Flutter opined the prevailing

factor for claimant's back condition was the accidental injury that occurred on October 27, 2011. Claimant testified that her back condition worsened and was different than the back pain she had previously experienced. The ALJ found the claimant's testimony and Dr. Fluter's opinion more persuasive. This Board Member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.³

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated June 14, 2012, is affirmed.

IT IS SO ORDERED.

Dated this 14th day of September, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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John D. Clark, Administrative Law Judge

² K.S.A. 44-534a.

³ K.S.A. 2010 Supp. 44-555c(k).